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CONSTITUTIONAL LAW—ASSESSING THE MEDIA'S RIGHT: COPYING AUDIO AND VIDEO TAPES PLAYED AS EVIDENCE IN CRIMINAL TRIALS

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INTRODUCTION

In 1986, three United States Courts of Appeals addressed for the first time the issue of the media's right to copy audio and video tape materials admitted and played as evidence in criminal trials.[1] In deciding these cases, each court of appeals attempted to identify the proper scope of the media's substantive rights concerning these requests.[2]

In defining the proper scope of the media's right, the appellate courts have looked to the Supreme Court for guidance, beginning with the case of *Nixon v. Warner Communications, Inc.*[3] *Warner Communications* is the only Supreme Court case to examine directly the legitimacy of the media's claim of a right of access to evidentiary recordings. Since its decision in *Warner Communications,* the Supreme Court has issued opinions recognizing the public's and the media's right to have open criminal trial proceedings, but has not ruled explicitly on the evidentiary recordings issue.[4] Part I of this

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1. Valley Broadcasting Co. v. District Court, 798 F.2d 1289 (9th Cir. 1986); United States v. Webbe, 791 F.2d 103 (8th Cir. 1986); United States v. Beckham, 789 F.2d 401 (6th Cir. 1986).

Audio and video tape materials admitted as evidence in criminal trials will hereinafter be referred to as "evidentiary recordings." All of the evidentiary recordings discussed in this comment had been played in open court, where the jury and the public had an opportunity to hear or see them.

2. The role of the federal courts of appeals in defining the scope of the media's right is central. Their role is to review the district court or trial court judges' decisions which grant or deny media access to copy requested materials. The appellate court determines if a lower court judge has considered the proper factors (which are discussed in this comment) and has given them each appropriate weight in deciding whether the media can copy the desired materials. In this way, the courts of appeals largely determine the extent of the media's right to copy evidentiary recordings within their circuits.

3. 435 U.S. 589 (1978). There were four opinions in *Warner Communications.* Justice Powell wrote the majority opinion and Justices White, Marshall, and Stevens each wrote separate dissenting opinions. *See infra* note 36.

4. *See* Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735 (1986) [hereinafter *Press-Enterprise II*] (recognizing right to open preliminary hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*] (recognizing right to open jury selection); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (recognizing right of access to "sensitive information"); Richmond Newspapers, Inc. v. Virginia,

comment examines the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*, as well as the Court's prior and subsequent decisions which play an important role in determining the extent of the media's right to copy evidentiary recordings. Issues left unresolved by the *Warner Communications* decision are also discussed.

After the landmark decision in *Warner Communications*, three federal courts of appeals confronted the issue of the media's right to copy evidentiary recordings obtained in the Federal Bureau of Investigation's Abscam probes.[5] During this same period, two other federal courts of appeals also considered, in different contexts, the extent of the media's right to copy evidentiary recordings.[6] These early opinions served as significant precedent in the recent decisions attempting to define the scope of the media's right. Part II of this comment traces and describes these early opinions and their implications.

Part III of this comment focuses on the recent decisions and current definitions of the scope of the media's right to copy evidentiary recordings. This section includes a description of the influence of both Supreme Court and earlier federal courts of appeals opinions on recent adjudications, and the implications of these recent decisions for lower court judges in ruling on future media requests. Finally, Part IV of this comment summarizes the current status of the media's right to copy, and calls for recognition of an appropriate and uniform standard of review for media requests.

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448 U.S. 555 (1980) (recognizing right to open courtroom). *Richmond Newspapers* and its progeny are discussed in the context of the development of a general right of access standard in Note, *What Ever Happened to "The Right to Know"?: Access to Government Controlled Information Since Richmond Newspapers*, 73 VA. L. REV. 1111 (1987).

5. *In re* Application of NBC, 653 F.2d 609 (D.C. Cir. 1981) (United States v. Jenrette); *In re* Application of NBC, 648 F.2d 814 (3d Cir. 1981) (United States v. Criden); *In re* Application of NBC, 635 F.2d 945 (2d Cir. 1980) (United States v. Myers).

Abscam was the name given to an undercover operation designed to observe United States Congressmen in the act of taking bribes for influence, a federal crime. FBI agents posed as Middle Eastern businessmen who offered large amounts of cash to the congressmen in return for promises of help in such governmental matters as the businessmen's immigration. The congressmen were recorded on video and audio tape arranging for, and accepting the bribes. The tape recordings were the principal evidence offered at trial to convict the congressmen, and also were the subject of the media's request to copy. *See Myers*, 635 F.2d at 947-49. For a more detailed description of the Abscam operation, see F. BERMAN, THE LESSONS OF ABSCAM (1982).

6. *In re* Video-Indiana, Inc., 672 F.2d 1289 (7th Cir. 1982) (United States v. Edwards); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. Unit A Aug. 1981).

For a discussion of the media's right to copy in light of both these cases and the Abscam cases see Comment, *The Common Law Right of Public Access When Audio and Video Tape Evidence in a Court Record is Sought for Purposes of Copying and Dissemination to the Public*, 28 LOY. L. REV. 163 (1982).

I. GUIDANCE FROM ABOVE: THE SUPREME COURT

A. *The Supreme Court Addresses the Right to Copy*

Analyzing *Nixon v. Warner Communications, Inc.*[7] is essential to understanding the development of the media's right to copy evidentiary recordings because *Warner Communications* is the only Supreme Court decision addressing that precise issue.[8] In the *Warner Communications* opinions, the Court examined the media's claims to both a constitutional right and a common law right to copy audio tapes introduced and played as evidence.[9] *Warner Communications* also is important because of its extensive use as precedent. Since the case was decided in 1978, every federal court of appeals to consider the issue of the media's right to copy evidentiary recordings has either followed *Warner Communications* or cited it as controlling.[10]

Any detailed description of the opinions in *Warner Communications* must begin with an understanding of the case's background. In *Warner Communications*, the Supreme Court reviewed a decision of the Court of Appeals for the District of Columbia Circuit to grant the media an opportunity to copy tapes introduced at trials stemming from the Watergate break-in and subsequent investigations.[11] The appellate court, in *United States v. Mitchell*,[12] ruled on the validity of District Court Judge Sirica's order[13] which prohibited television networks and others[14] from making copies of the tapes.[15]

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7. 435 U.S. 589 (1978).

8. *Id.* at 597.

9. *Id.* at 597-608. The Court also considered the various claims of the parties seeking to deny access to the tapes. *Id.* *See infra* notes 28-30, 32 and accompanying text.

10. Courts look to *Warner Communications* for guidance because it is the only United States Supreme Court case that addressed a fact pattern in which the media requested an opportunity to copy evidentiary recordings and an opposing party objected to that request. It is the similarity in fact pattern and the Court's descriptive language which makes the case the obvious first choice of appellate courts looking for Supreme Court guidance on the media's right to copy. However, there are significant differences between the fact pattern in *Warner Communications* and the patterns in the federal appellate court cases. The degree of precedential value given *Warner Communications* is one of the focuses of the dispute over the scope of the media's right. *See infra* note 43.

11. Nixon v. Warner Communications, 435 U.S. 589 (1978), *rev'd on other grounds sub nom.* United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976).

12. 551 F.2d 1252 (D.C. Cir. 1976).

13. The procedural background of Judge Sirica's order is somewhat complicated; a summary precedes the appellate decision. *Id.* at 1255-57. It is sufficient here to say that his particular order was without prejudice, and all that the appellate court reviewed was whether Judge Sirica abused his discretion by delaying the release of the tapes because of possible prejudice to the defendants (because their appeals were pending and new trials might have been ordered).

14. The three commercial television networks, (ABC, NBC and CBS), the Public

The majority in *Mitchell* began by analyzing the common law right to inspect and copy public records.[16] The court traced the right back to its English origins,[17] and stated that American courts traditionally have granted access to public records to "all taxpayers and citizens."[18] Next, the *Mitchell* court found that the common law right to inspect public records extended to judicial records as well.[19] The court viewed this extension of the right as fundamental to the effective

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Broadcasting System, the Radio Television News Directors Association, and a large manufacturer of phonograph records (Warner Communications) sought to copy the tapes. *Id.* at 1254.

15. The tapes sought by the media were portions of former President Nixon's "White House tapes" that had been played before the jury at the criminal trials of several of Nixon's top aides. The trial court subpoenaed the tapes from President Nixon against his will and the Supreme Court in United States v. Nixon, 418 U.S. 683 (1974), upheld the subpoena. *Mitchell*, 551 F.2d at 1254, 1255.

16. *Mitchell*, 551 F.2d at 1257-60. It has been suggested that the right to inspect and the right to copy are totally distinguishable. *See* Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 FORDHAM L. REV. 551, 556 (1982).

17. *Mitchell*, 551 F.2d at 1257.

18. *Id.* (citing State *ex rel.* Colscott v. King, 154 Ind. 621, 57 N.E. 535 (1900), and other cases).

The *Mitchell* court discussed the common law right of access to public records as it arose at state common law. The court did not apply any specific state's substantive law to the issue, but instead integrated "well-settled" state law to fashion its own law of independent federal judicial decision. *Id.* at 1258.

The Supreme Court has sanctioned the formulation of a "federal common law." In Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943), rather than apply the *Erie* doctrine and look to state law for the rule of decision, the Court fashioned its own federal substantive rule of law. The Court developed this federal common law to protect federal interests where the parties' rights and duties were imposed by federal law (the Constitution and federal statutes), yet Congress had not specifically revised a rule of decision. *Mitchell*, 551 F.2d at 1258. *See also* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring). The basis of the technique rests on the federal nature of the function involved, not that the United States is a party. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 801 (1957).

In *Mitchell*, as well as the other cases discussed in this comment, the accused is charged with federal crimes and federal law (both the Constitution and federal statutes) determines the parties' rights and duties. The fact that the court formulates a federal common law to govern the case is, therefore, not surprising. *See* Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10-26 (1975); Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410, 421-22 (1964).

See also Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1526-31 (1969); Note, *Federal Common Law*, 30 OR. L. REV. 164 (1951); Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966 (1946). *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 765-70 (1973).

19. *Mitchell*, 551 F.2d at 1258 ("Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what be-

functioning of a democratic state.[20]

In considering the importance of this common law right, the *Mitchell* court commented on the influences of the first, fifth, sixth, and fourteenth amendments in strengthening the common law right to inspect and copy judicial records.[21] The court concluded this section of the opinion by stating that it only referred to the constitutional provisions to "underscore the importance of the values that the common law right seeks to protect, and to make clear our duty to tread carefully in this important area."[22] The court then declared that the common law right to inspect and copy judicial records applied to "exhibits."[23] The *Mitchell* court also delineated the scope of the common law right to inspect and copy judicial records as applied to evidentiary recordings. It emphasized that the right was not absolute, and that "[b]ecause no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within the sound discretion of the courts, subject to appellate review for abuse."[24]

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longs to a public court of record, to which all persons have the right of access . . . .") (quoting *Ex parte* Drawbaugh, 2 App. D.C. 404, 407-08 (1894)).

20. *Id.* The court said, "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . . . A people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* (footnote omitted) (quoting a letter from James Madison to W.T. Barry, Aug. 4, 1822, in 9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910)).

21. *Id.* The *Mitchell* court stated the constitutional connections thus: "Like the First Amendment, then, the right of inspection serves to produce 'an informed and enlightened public opinion.' " *Id.* (citing Grosjean v. American Press Co., 297 U.S. 233, 247 (1936)).

Concerning the sixth amendment the court said, "Like the public trial guarantee of the Sixth Amendment, the right serves to 'safeguard against any attempt to employ our courts as instruments of persecution,' to promote the search for truth, and to assure 'confidence in . . . judicial remedies.' " *Id.* (footnote omitted) (quoting *In re* Oliver, 333 U.S. 257, 270 & n.24 (1948)).

The court also said, "[L]ike the Fifth and Fourteenth Amendments, the right of inspection serves to promote equality by providing those who were and those who were not able to gain entry to [a] . . . cramped courtroom the same opportunity to hear the . . . tapes." *Id.*

22. *Id.* at 1259. The court reached this conclusion because it was able to hold in favor of the media without resorting to the purely constitutional question. A strong common law right was sufficient to overcome the arguments of the respondents who sought to deny access.

23. *Id.* at 1260. The actual physical tapes which had been played in open court as evidence in the trials were considered "exhibits" in this case.

24. *Id.* Similar statements are prevalent throughout the cases which address the media's right to copy. There is considerable difference in the amount of judicial discretion allowed among the jurisdictions, and thus the issue of trial judge discretion is a source of continuing debate. *See infra* note 42.

While leaving the decision to the discretion of the trial judge, the *Mitchell* court did not leave the judges without any guidance. The court contoured its definition of the scope of the common law right by stating that any incursions on the right should be made only when "justice so requires."[25] The court also stated that " '[a] trial is a public event,' " and " 'what transpires in the court room is public property.' "[26] Before considering the arguments for and against denying access, the *Mitchell* court noted that "once an exhibit is publicly displayed [in open court], the interests in subsequently denying access to it necessarily will be diminished."[27]

Next, the *Mitchell* court, in defining the media's right, considered the specific arguments of those seeking to deny or gain access to copy in that case. The court heard arguments that release of the tapes would prejudice the defendants' rights by making it impossible to impanel an impartial jury.[28] It also considered the privacy rights of those

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25. *Mitchell*, 551 F.2d at 1260.

26. *Id.* at 1261 (footnote omitted) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

27. *Id.* This argument is a major theme running through the right to copy cases. The defendant's claim that publicity may hurt the fair operation of the trial is diminished when an item has been displayed. This is because the press may report what they have heard in the courtroom, which necessarily leads to a certain amount of publicity. If the tapes are disseminated to the public, the only increased danger to the defendant's trial is the incremental increase in publicity over and above that which would already exist. In a case where a tape has been introduced as evidence, but not played in the courtroom because the tape's mere existence is its only evidentiary use, the difference in publicity after tape dissemination would be much greater.

It is important to note that in the right to copy cases discussed in this comment, the media is requesting only those tapes which have been played in open court. Recordings withheld from the public in the courtroom do not warrant the full weight of the arguments behind full public access to tapes played in open court.

28. The possible prejudice to the defendants' fair trial was Judge Sirica's principal reason for denying access. *See supra* note 13. The *Mitchell* court recognized that the only risk of prejudice was that which would occur at a possible second trial. The court deemed this risk insufficient to outweigh the right to access because: (1) there always may be a pending appeal; (2) the risk of not finding an impartial jury is small; and (3) in this particular case the defendants themselves were not overly concerned about the release of the tapes. *Mitchell*, 551 F.2d at 1261-63.

This aspect of the right to copy is usually the central area for dispute among the courts of appeals. One of the courts' (and the defendants') major concerns is that the defendants may not get fair trials. Arguably, if publicity endangers trials, the courts should protect against it whenever the danger is recognized. On the other hand, there is a point at which the risk of danger to fair trials is so remote that the interests of the media necessarily outweigh a judicially imposed restriction on the dissemination of information. This dispute, in its basic form, centers on how much the publicity from disseminated evidentiary recordings affects the public as a whole, and thus the courts' ability to impanel impartial juries at subsequent trials.

recorded on the tapes,[29] together with the increased "national interest" in the material on the tapes, because the tapes included recordings of high government officials.[30]

In *Warner Communications*, the Supreme Court reviewed the *Mitchell* decision and, in a five to four decision, reversed *Mitchell*, holding that neither the right of the press nor that of the public required release of the tapes in question.[31] The Supreme Court first addressed the common law right to access. After recognizing its

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29. The *Mitchell* court stated that the privacy argument of President Nixon (while not a defendant, Nixon asserted that as a party on the tapes, his privacy interest necessarily was affected) was insufficient to overcome the media's right to copy. This was because the tapes' content was not personal or intimate conversation, but was conversation between business associates concerning matters of national and governmental importance. The only embarrassment to any party on the tapes would arise out of these unprotected discussions. *Id.* at 1263-64.

The issue of the parties' privacy is central in most of the right to copy cases. Some courts are willing to protect the parties on the tapes from possible embarrassment. *See* United States v. Webbe, 791 F.2d 103 (8th Cir. 1986); United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. Unit A Aug. 1981). Other courts have reasoned, like the court in *Mitchell*, that when the conversations on the tapes do not involve personal material but, in fact, contain material of high public interest, the parties' privacy concerns are minimal. *See* Valley Broadcasting Co. v. District Court, 798 F.2d 1289 (9th Cir. 1986); United States v. Myers, 635 F.2d 945 (2d Cir. 1980).

Additionally, pre-recorded depositions played in open court have been recognized as warranting no special privacy protection because recorded deposition testimony is considered "before the public." United States v. Salerno, 828 F.2d 958, 960 (2d Cir. 1987).

30. *Mitchell*, 551 F.2d at 1264. The *Mitchell* court noted that the "national interest" increased the public interest in the tapes, and therefore, the right to copy. *Id.*

This is another prevalent argument in the right to copy cases. Usually, the requested tapes involve public figures on trial for a crime, and there is heightened public interest because of their positions. Some courts reason that the public interest in the tapes is not a factor to be considered when the defendants' fair trial rights might be in jeopardy, and moreover, that because of pervasive skepticism about public officials, increased public awareness of a public figure's trial may lead to a greater possibility of an unfair trial. The opposing argument is that the public's right to information is made even stronger when the information concerns the government, because one of the essential ingredients of an effective self-governing state is the dissemination of information about government officials and government activities. *See supra* note 20.

Judge MacKinnon's dissenting opinion in *Mitchell* focused on the parties' property rights in the tapes and the interest in protecting the tapes' physical integrity. *Mitchell*, 551 F.2d at 1265-66 (MacKinnon, J., dissenting). These two minor arguments are disposed of in most of the other cases. The property right argument is criticized because once the tapes are played in the courtroom, the words themselves are considered public property. *See supra* text accompanying note 26. With regard to the physical integrity of the tapes, it seems reasonable that the original tapes could be protected from physical damage during copying. *See infra* text accompanying note 132.

31. Justice Powell wrote the majority opinion. Justice Brennan joined Justice White's opinion which, although dissenting in part, substantially agreed with the majority. Justices Marshall and Stevens filed dissenting opinions which departed significantly from the majority. *See infra* note 36.

applicability to the tapes in question, the Court listed former President Nixon's arguments against releasing the tapes. President Nixon argued for protecting his privacy interests, for protecting accuracy, and for protecting against embarrassment and commercialization.[32] The media's arguments centered on the need for public understanding, the presumption in favor of public access to judicial records, and the fact that there already had been wide dissemination of printed transcripts of the tapes.[33]

Instead of assigning weight to the interests advanced by the parties and striking a balance between those interests as framed by the case's facts and arguments, as the Court normally would do in such a case,[34] it claimed that the existence of the Presidential Recordings Act made release of the tapes improper.[35] The Court refused to balance the competing interests because the availability of a congressionally created alternative means of access "tips the scales" against the media's request.[36] The presence of alternative means of public access be-

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32. *Warner Communications*, 435 U.S. 589, 599-602 (1978). President Nixon's claims were basically the same as those in the *Mitchell* case and were discussed by the Supreme Court using the language of that case. The Court seemed to be leaning toward agreement with the *Mitchell* court on evaluating the President's arguments. The Court recognized the existence of his arguments as factors to be considered, but did not address their weight. President Nixon's claim of a property right was treated similarly. *Id.* at 597-602. President Nixon continued the property claim in another suit against the government for damages for loss of property.

The claims of possible future prejudice to the Watergate defendants were not at issue because there were no more pending trials or appeals concerning persons on the tapes. The final decision in *Warner Communications*, in 1978, was at least two years after the final Watergate convictions and appeals. *Id.* at 602 n.14.

33. *Id.* at 602. Once again, the Supreme Court recognized and discussed these factors in light of the *Mitchell* decision, but did not rule conclusively on their weight. *Id.*

34. *Id.* at 602 ("[W]e normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts.").

35. *Id.* at 603.

36. *Id.* at 606. Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, §§ 101-106, 88 Stat. 1695-98 (1974) (codified as amended at 44 U.S.C. § 2111 (1982 & Supp. III 1985)). Congress created the Act to direct the General Services Administrator to supervise a process of screening the materials for private matter, and releasing matters of historical importance. The Court called the Act's existence a "unique element" of this right to copy case and the reason for not balancing the arguments of the parties. *Warner Communications*, 435 U.S. at 603.

Justice White's separate opinion, with which Justice Brennan joined, agreed that the Act was dispositive in the case, but argued that the tapes held by the district court should be sent to the Administrator for processing immediately. *Id.* at 611-12 (White, J., dissenting in part).

Justice Marshall dissented, concluding that the media's right was strong and that the Act, if anything, supported the media's request because its existence admitted that the in-

came the controlling factor in denying release.[37]

At the end of its opinion, the Court commented on the media's constitutional claims. Holding that neither the first amendment freedom of the press guarantee nor the sixth amendment right to a public trial required the tapes' release,[38] the Court interpreted *Cox Broadcasting Corp. v. Cohn*[39] to mean that the press has no more right than the public to information that is a matter of public record.[40] The

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formation on the tapes was suitable for public dissemination. *Id.* at 612-13 (Marshall, J., dissenting).

Justice Stevens dissented because he agreed with Justice Marshall and believed that the trial judge (here speaking of the first trial level decision to release the tapes, the order altered by Judge Sirica but affirmed by the ruling of the appellate court) was in the best position to determine the conditions surrounding a media request, and therefore, the judge should make the decision to grant or deny the request absent the Supreme Court's interference. *Id.* at 614-16 (Stevens, J., dissenting).

37. For a discussion of the concept of alternative means of access in the context of several cases where the press sought government-held information, see Note, *Press Access to Government-Controlled Information and the Alternative Means Test*, 59 TEX. L. REV. 1279 (1981) (*Warner Communications* discussed at 1287-88).

38. The Court held that these purely constitutional arguments were not valid because the media could not assert correctly that the first or sixth amendments directly applied to a media request to copy evidentiary recordings. *Warner Communications*, 435 U.S. at 609-10. The Court did not consider, in contrast to the *Mitchell* court, that these constitutional claims represented values which could intensify a common law right to copy. *Id.*

For a summary of the values served by the constitutional provisions and the common law right, see *supra* note 21.

39. 420 U.S. 469 (1975). Cox recognized that "freedom of expression guaranteed by the first and fourteenth amendments precluded a state from imposing civil liability for publication of accurate information properly obtained from official records open to the public" which identified a rape victim. Recent Case, 14 DUQ. L. REV. 507, 508 (1976).

40. *Warner Communications*, 435 U.S. at 608-09. *See also* Houchins v. KQED, 438 U.S. 1 (1978). In *Houchins*, news broadcasters sought permission to inspect and take pictures within a county jail in order to disseminate information to the public about alleged poor conditions there. *Id.* at 3-4. The Supreme Court upheld the limitation on access imposed by the jail officials, thereby giving the press no more access than was allowed to the public on regular tours. *Id.* at 4-16. *See* Note, *No Special Right of Press Access to Information*, 53 TUL. L. REV. 629 (1979).

The media's response to this argument is that they seek to copy and disseminate to the public no more than the public would have a right to observe had the public been able to be present in the courtroom, and that their role is substitutionary for those not able to be present. The press argues, therefore, that they are not seeking more access than the general public, just *effective* access for the wider public.

The decision in *Houchins* is also important for its discussion and denial of the public's claim of a constitutional right to government-held information about jails. *Houchins*, 438 U.S. at 8-15. An analogy might be drawn between government-held information about jail conditions and government-held information from a trial. This analogy supports the proposition that the public's right to evidentiary recordings should be limited in the same way as the public's right to information about jail conditions. However, the government's interest in a jail access case is the secure operation of the jail; in a request for evidentiary recordings, the government's interest is in a fair trial. The disparity in government interests weakens the argument for similar treatment of the cases. In addition, the Supreme Court

Warner Communications Court also reasoned that the right to a public trial is satisfied by the ability of the press and the public to attend the trial and report on what they had observed.[41]

What is important to derive from *Warner Communications* is a sense of what the Court did not say. It did not identify or weigh all of the arguments for or against media copying under the common law right, and it gave little guidance as to the proper weight of each in striking a balance among them. It never coupled the constitutional claims of the press with the common law right in order to give that right more support. Nor did the Court specifically address the major right to be protected by denying a media request, that being the defendant's right to a fair trial. The Court seemed to accept the fact that appellate courts would have to make these determinations on their own, and said that the decision to grant or deny access should in the future be left to the sound discretion of the trial judge.[42]

Another unanswered question is the extent to which the Supreme Court approves of the *Mitchell* court's approach. It is difficult to determine if the Court's avoidance of a clear disagreement with the *Mitchell* approach in some way makes *Mitchell* acceptable. In the face of this uncertainty, appellate courts are left with the problem of how to apply *Warner Communications* to media requests to copy. Arguably, the variety of interpretations among later decisions is attributable to the issues left unresolved by the majority opinion in *Warner Communications*.

There are two ways to view the precedential effect of *Warner Communications*. It can be viewed as the final word of the Supreme Court on the issue of media requests to copy evidentiary recordings, leading courts to try to find a standard for review of media requests within its language. Alternatively, it can be viewed as a decision lim-

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made clear in its later decision in Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), that the public's access to criminal trials, unlike access to other areas of governmental operation, is specially protected by the first amendment. *See infra* text accompanying notes 44-48.

41. *Warner Communications*, 435 U.S. at 610. In *Warner Communications*, the press was allowed to attend the trial, obtain transcripts of the tapes, and print and report on any materials that they already possessed. *Id.*

The opportunity of the press and public to attend the trial and report on what they observed was the fatal blow to the media's sixth amendment (right to a public trial) claim. Therefore, the Court gave the impression that a trial is deemed public when the courtroom doors are open, and the purposes behind the sixth amendment right to a public trial are satisfied if those in the courtroom can tell others what they observed.

42. *Id.* The holding is unclear on the amount of sound discretion afforded the trial judge. This lack of clarity results in variation among the circuits in the level of discretion allowed to trial judges. *Id.*

ited by its own facts, meaning that courts must look beyond it for clues about the proper standard of review for media requests to copy.[43]

B. *The Supreme Court's Concern for Open Trials*

A line of Supreme Court cases in which the Court addressed the issue of the public's right to attend criminal trials (as well as the media's right) influenced some of the appellate decisions regarding media requests to copy evidentiary recordings. In *Richmond Newspapers, Inc. v. Virginia*,[44] the Supreme Court held that the first amendment assures the press and the public the right to have criminal trials open to them.[45] The Court based its reasoning, in part, on the need to preserve first amendment interests of an informed public dialogue on areas of governmental operation. The Court also was concerned with protecting the right of the press and public to have an opportunity to be physically present in the public areas of the courtroom.[46]

It is possible to view the *Richmond Newspapers* decision as totally unrelated to the issue of media requests to copy. The holding can be interpreted as protecting press attendance at criminal trials, but conferring no special right on the press to do anything more than report on what they have observed. This position seems consistent with the holding in *Warner Communications* because that case also did not

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43. The dispute over the precedential value of *Warner Communications* is not based solely on the fact that the special nature of the Presidential Recordings Act, as an alternative means for public dissemination, may make the Court's discussion of the parties' claims mere dicta. Also at issue is the relevance of who is seeking to prevent the copying. In *Warner Communications*, President Nixon sought to prevent the copying mostly for privacy reasons. *Warner Communications*, 435 U.S. at 600-01. In virtually all of the other cases, it is the defendants, arguing that their fair trial right is in jeopardy, who oppose the media's request. For a list of several such cases, see *supra* notes 1, 5, 6. *Compare* United States v. Salerno, 828 F.2d 958 (2d Cir. 1987).

For analysis of *Warner Communications* and the dispute over its significance, see Note, *Recognizing a Constitutional Right of Media Access to Evidentiary Recordings in Criminal Trials*, 17 U. MICH. J.L. REF. 121 (1983).

44. 448 U.S. 555 (1980).

45. *Id.* at 576-77. *Richmond Newspapers* is a case in which the media successfully prevented a continued "closure" of a murder trial. The trial judge had ordered the closure, which kept the press and the public out of the courtroom. The case has been discussed extensively. *See, e.g.*, Note, *supra* note 4; Note, *The First Amendment Right of Access to Government-Held Information: A Re-evaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292 (1982); Comment, *Is the Right of Access to Trials an Instance of a First Amendment Right to Know?*, 42 OHIO ST. L.J. 831 (1981); Note, *The Public's Right to Access Versus the Right to a Fair Trial: A Balancing Compromise*, 33 BAYLOR L. REV. 191 (1981); Note, *A Foot in the Government's Door—Access Rights of the Press and Public*: Richmond Newspapers v. Virginia, 12 U. TOL. L. REV. 991 (1981).

46. *Richmond Newspapers*, 448 U.S. at 575-78.

confer a special right of access on the media.[47]

In contrast, the decision in *Richmond Newspapers* can be viewed as influential in determining the proper standard of review for media requests to copy. By articulating a first amendment interest in preserving the public's rights to information and physical presence in the courtroom, the Supreme Court in *Richmond Newspapers* strengthened the arguments in favor of granting media requests to copy.[48]

The Supreme Court repeated the theme that it is important for the public to have access to information at criminal trials in the recent cases of *Press-Enterprise Co. v. Superior Court (I and II)*.[49] In those cases, the Supreme Court recognized, under the first amendment guarantee of open public proceedings in criminal trials, the constitutional right of the public to attend both jury selection and preliminary hearings.[50] In the *Press-Enterprise* cases, the Court reaffirmed the reasoning of *Richmond Newspapers*,[51] and summarized the Supreme Court's

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47. *Warner Communications*, 435 U.S. at 609. *See supra* note 40.

48. *Richmond Newspapers*, 448 U.S. at 575-76. Those arguments are that granting media requests to copy will preserve the public's first amendment interests by leading to a greater public understanding based on accurate information, and that the media, through copying evidentiary recordings, play a substitutionary role for the members of the public who are unable to be present at the trial.

See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). In that case, the Court stated that the right of access applied to "sensitive information" which arose out of a minor's rape trial. The *Globe Newspaper Co.* opinion is important because it established a standard by which parts of a criminal trial may be closed to the public: "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Id.* at 606-07.

49. *Press-Enterprise II*, 106 S. Ct. 2735 (1986); *Press-Enterprise I*, 464 U.S. 501 (1984).

50. *Press-Enterprise I* arose in connection with a rape trial in which the State of California sought to keep the press out of the voir dire jury selection process in order to protect against the dissemination of personal and sensitive material disclosed in some of the proceedings. The State of California sought to protect the privacy rights of the potential jurors. In denying the state's request, the Court reasoned that traditionally, jury selection had been open to the public and that open jury selection enhances both trial fairness and public confidence in the criminal justice system. *Press-Enterprise I*, 464 U.S. at 505-10.

Press-Enterprise II arose in connection with a multiple murder trial. The defendant sought to close the preliminary hearing to protect his fair trial right. In denying the defendant's request, the Court stated that, like the parts of the trial considered in *Richmond Newspapers*, *Globe Newspaper Co.*, and *Press-Enterprise I*, preliminary hearings traditionally had been open, and that their openness is no less essential to the proper functioning of the criminal justice system than public access to the trial itself. *Press-Enterprise II*, 106 S. Ct. at 2742.

51. *See, e.g.*, *Press-Enterprise I*, 464 U.S. at 509. (" 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' Closed proceedings, although not absolutely precluded,

attitude toward actively protecting the rights of the press and public to obtain information from criminal trials.[52] Thus, an apparent trend of the Court is to extend first amendment principles to more aspects of a trial.

Considering evidentiary recordings as one aspect of the trial, and thus within the purview of the Court's expanding protection, is a reasonable response to the Supreme Court's reasoning in *Richmond Newspapers* and the *Press-Enterprise* cases. Disseminating information to the public in the form of evidentiary recordings, especially in cases involving public officials, seems even more vitally connected to the purposes stated in the *Press-Enterprise* cases than open jury selection or pre-trial proceedings. The information contained on the tapes is more useful in generating public dialogue. In forming opinions about what has transpired in the courtroom, evidence is more important to the public than jury selection or pre-trial hearings because evidence is more directly related to the crime charged and is often more essential to the outcome of the case.

In the decisions concerning the media's and the public's right to open trials and the right to information from trials, the Court has not yet analogized the common law right to inspect and copy judicial records to the public's right to attend trials. No Supreme Court case dealing with the importance of the public's opportunity to attend a trial has cited or considered *Warner Communications*. Perhaps this is because the Court believes that the two rights are unrelated. On the other hand, the Court may recognize that the holding in *Warner Communications* is limited to its facts.[53]

Alternatively, one can consider the decision in *Richmond Newspapers* as recognizing for the first time, a first amendment right of access which expands the scope of the first amendment to an extent not considered in *Warner Communications*. It is arguable that *Warner Communications* stands simply for the notion that the press should

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must be rare and only for cause shown that outweighs the value of openness." (footnote omitted) (quoting *Richmond Newspapers*, 448 U.S. at 572)).

52. *See Press-Enterprise I*, 464 U.S. at 517-18 (Stevens, J., concurring) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' ") (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)); *Press-Enterprise II*, 106 S. Ct. at 2744-52 (Stevens, J., dissenting). Justice Stevens disagreed that there existed a traditional right of access to preliminary hearings, but believed that, historically, the trial itself was open. *Id.* Justice Stevens believed that first amendment purposes were served by access to all parts of the actual trial. *Id.* Arguably, complete access to trials would include access to evidence displayed in open court.

53. *See supra* notes 31-36 and accompanying text.

have no more right than the public to government-held information, while *Richmond Newspapers* extends the public's right of access, under the first amendment, to criminal trials. Consequently, the holding in *Richmond Newspapers* significantly undermines the constitutional analysis in *Warner Communications*, because the *Richmond Newspapers* holding modifies the basic assumption in *Warner Communications* that the public has no constitutional right to trial information.

In the context of the Supreme Court cases recognizing the public's right to open trials, it is plausible to conclude that the media's right to copy should be included. This is because the right to copy and the right to attend trials are indeed related by common purposes. The main purpose behind both is the protection of a free flow of information to the public, especially when that information concerns an area of governmental operation. Another common purpose is to provide effective access for the public to observe what happens in the courtroom.[54]

C. *The Supreme Court's Concern for Fair Trials*

While the Supreme Court appears to be in favor of extending the public's right to information from criminal trials, the Court also has

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54. In contrast, a strong argument is made that closure orders are of far greater significance to the public dialogue than a denial of a request to copy recordings that have been played in open court and, therefore, the right to copy should not be based on the right to open trials. A closure order completely shuts off public access to information, whereas under a copying denial the public can still get information because the media can report on what they have observed. In both *Warner Communications* and *Houchins*, the Court relied on this argument. *See supra* note 40.

Such reasoning fails to recognize that at stake in a denial of a media request to copy is the ability of the public to receive the actual information contained on the tapes. Persons who are unable to be present in the courtroom will be unable to get as accurate information as those who could be present, and in effect are closed off from complete understanding of what has transpired because of their inability to attend the trial. Denial of a media request to copy evidentiary recordings can, therefore, be considered as serious as a closure order.

The media can, however, play a substitutionary role for the public which is unable to attend the trial. To some extent, the media become the eyes and ears of the public, although it cannot be doubted that information observed and filtered through the eyes and ears of the media is somewhat distorted and conclusive when reported. For certain news, this situation is not undesirable, and the distortion is not dangerous. However, the main objective behind open trials is that the public has an accurate awareness of what transpired in the courtroom. By copying and broadcasting evidentiary recordings, the media help the public gain access to a more objective and unanalyzed view of the trial. Without broadcast of the actual tapes, the media's role goes beyond that of substitute for the public's eyes and ears, and becomes a substitute for the public's judgment. Because the Supreme Court in *Richmond Newspapers* and other cases has declared criminal trials to be an area of governmental operation in which dissemination of information to the public is essential, trial information should be treated differently from ordinary news. Trial information should be reported as accurately as possible and disseminated to the widest extent possible.

been very concerned with protecting the defendant's sixth amendment right to a fair trial. The Court has held that media publicity can affect that defendant's right.[55] An example of this recurring theme can be found in Supreme Court language supporting the rights of the accused: "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused."[56] Conversely, the Court also has held that the risk of juror prejudice in some cases does not justify a ban on broadcast coverage of a trial, and that a safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage has compromised the ability of the jury to be fair.[57]

The basic conflict, therefore, is identified. The public has an interest in receiving information from trials, and the courts have a duty to protect defendants from unfair trials. The long-standing conflict between these interests has been considered in many contexts.[58] The

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55. *See* Estes v. Texas, 381 U.S. 532, 539-40, 552 (1965) (holding that defendant was denied a fair trial because televising it had contributed to the trial's "sensationalism" and "carnival atmosphere").

56. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). In *Sheppard*, the Supreme Court held that the defendant's trial was not protected adequately from prejudicial publicity. The Court offered several suggestions to cure such a problem, such as transferring the case, jury sequestration, or a new trial. *Id.* at 363. For a complete listing of the curative measures available to defendants and trial courts when unfairly prejudicial publicity can be shown, see *infra* note 57.

See also Gannett v. DePasquale, 443 U.S. 368, 378 (1979) (trial judge granted discretion to order closure of a pre-trial hearing in order to protect the defendant's rights). Justice Blackmun's lengthy dissent in *Gannett* summarizes attitudes toward a defendant's sixth amendment fair trial right. *Id.* at 406-48 (Blackmun, J., dissenting). Justice Blackmun's opinion, while not precedent, is an example of the language used by the Court in discussing fair trial issues.

The decision in *Gannett* is considered by many commentators to be greatly affected by *Richmond Newspapers*. *See* Lewis, *A Public Right to Know About Public Institutions: The First Amendment as a Sword*, 1980 SUP. CT. REV. 1; Comment, *Confusion in the Courthouse: The Legacy of the Gannett and Richmond Newspapers Public Right of Access Cases*, 59 S. CAL. L. REV. 603 (1986); Note, *The First Amendment Right of Access to Government-Held Information*, 34 RUTGERS L. REV. 292 (1982).

57. Chandler v. Florida, 449 U.S. 560, 575 (1981) (allowing the state to permit television coverage of a criminal trial because there was no inherent violation of the defendant's rights).

The defendant has many options for remedying a situation in which he or she can show unfairly prejudicial pre-trial publicity, such as: appeal, transfer of the case, jury sequestration or voir dire examination, curative jury instructions, or even a new trial. The options are available to trial court judges when such a showing has been made. For a discussion of these measures, see Note, *Alternatives Available to Trial Courts to Protect Jurors from Prejudicial Publicity*, 9 SETON HALL L. REV. 73, 77 (1978).

58. An example of the Supreme Court's having to decide between the defendant's sixth amendment right to a fair trial and the public's first amendment right to an open trial

statement in *Warner Communications* that the light in which factors should be weighed is controlled by "the public interest and the duty of the courts"[59] appears to mean that requests to copy evidentiary recordings will be one more arena for the ongoing conflict between the public's right to information and the criminal defendant's right to a fair trial.

It is not clear immediately what principle should be derived from this array of Supreme Court decisions when deciding whether to grant a media request to copy evidentiary recordings. Because *Warner Communications* did not give the appellate courts a standard to apply in reviewing right to copy cases, and in fact left the issue open to trial judge discretion, courts at both the appellate and trial levels can extract from these Supreme Court cases those policy arguments which they believe strengthen or weaken arguments in favor of granting requests to copy.

This ambiguity arising from the majority opinion in *Warner Communications* presents a problem for the federal courts of appeals when they consider media requests. The appellate courts do not know to what extent the articulated purposes of an open trial support the common law right to copy, or how much weight to give the defendant's claim of interference with the fair trial right. The appellate courts also do not know the extent of the trial judge's discretion in granting or denying requests. These ambiguities have led to variations in the treatment of copying requests among the circuits. The next section discusses the approaches of several courts of appeals which were forced to strike a balance based on this limited Supreme Court guidance.[60]

II. THE EARLY CASES: EXTREME VARIATIONS

A. *United States v. Myers*

After *Warner Communications*, the first cases which involved me-

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occurred in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), in which the Court held that the public's first amendment right outweighed the defendant's sixth amendment right. *Id.* at 570. There, the trial judge did not articulate the potential harm to the accused when giving an order to close some pre-trial proceedings. *Id.* at 569. For a detailed analysis of the case, see the following symposium: *Nebraska Press Ass'n v. Stuart*, 29 STAN. L. REV. 383-626 (1977).

59. *Warner Communications*, 435 U.S. 589, 602 (1978).

60. Since the cases in the next section also predate some of the Supreme Court decisions discussed above (*Richmond Newspapers* and the *Press-Enterprise* cases were decided after the initial request to copy cases), Supreme Court guidance may be considered even more limited. *See supra* notes 5-6.

dia requests to copy arose out of the Federal Bureau of Investigation's Abscam investigations and subsequent trials of several United States Congressmen. In *In re Application of NBC (United States v. Myers)*,[61] the Court of Appeals for the Second Circuit upheld a district court decision granting the media's request to copy a video tape admitted as evidence. The tapes showed the defendants, Congressman Michael Myers and others, committing the crimes for which they eventually were convicted.[62]

The *Myers* court followed the direction of the District of Columbia Circuit Court of Appeals in *Mitchell* and adopted a strong presumption in favor of the common law right to inspect and copy.[63] In qualifying that presumption, the *Myers* court recognized the two lines of authority that influenced its decision: the responsibility of the courts to insure a fair trial for the defendant, and the Supreme Court's emphasis on "the high public interest in full opportunity to know whatever happens in a courtroom . . . ."[64]

The *Myers* court stated that the possibility of unfairness to the defendant, posed by the release of this kind of evidence, was minimal. The court claimed that the defendants overestimated the public's awareness of news, and claimed that voir dire examination of jurors could eliminate any problems.[65] The court ended its review of the defendants' rights by concluding that the "alleged risk to a fair trial for the Abscam defendants yet to be tried is too speculative to justify denial of the public's right to inspect and copy evidence presented in open court."[66]

The *Myers* court also reasoned that the fact that the tapes contained evidence of the behavior of high public officials, and that the

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61. 635 F.2d 945 (2d Cir. 1980). *See supra* note 5.

62. *Id.* at 947. For a description of the tapes and excerpts from their contents see Note, *The Common Law Right of Access to Taped Evidence*, 50 GEO. WASH. L. REV. 465, 482-83 (1982).

63. *Myers*, 635 F.2d at 952.

64. *Id.* at 951. The court also looked specifically at *Mitchell* and a case decided by a New York state court, Hearst Corp. v. Vogt, 62 A.D.2d 840, 406 N.Y.S.2d 567 (1978). These cases fall within the two broad categories of cases recognized by the court. The opinion in *Mitchell* supports the presumption in favor of protecting the public's interest in what goes on in the courtroom, *Myers*, 635 F.2d at 950, while the *Mitchell* court interpreted the opinion in *Vogt* as supporting strong protection of the defendant's fair trial rights. *Id.* at 951.

65. *Myers*, 635 F.2d at 953. The court also reminded the defendants of the immense publicity surrounding the Watergate trials and of the fact that it was possible to impanel an impartial jury and to insure a fair trial for the Watergate defendants. *See also supra* note 57.

66. *Id.* at 954. *See supra* note 28.

tapes already were played in open court, intensified the common law right to copy.[67] The *Myers* court also emphasized the Supreme Court decision in *Richmond Newspapers* and viewed its policy discussions as favorable to strengthening the common law right to copy judicial records.[68]

The *Myers* case, while decided before the more recent Supreme Court cases which seek to recognize the public's right to have criminal proceedings open to them, marks the farthest extension of the common law right to copy evidentiary recordings recognized by the courts.[69]

B. *United States v. Criden*

The Third Circuit Court of Appeals in *In re Application of NBC (United States v. Criden)*,[70] also gave the common law right a strong presumption. In *Criden*, the court reversed a district court decision denying a media request to copy Abscam tapes.[71] The district court attempted to define the media's right by looking exclusively to *Warner Communications* for support, and by disagreeing with the "expansive view of the common law right of access" espoused by the Courts of Appeals for the District of Columbia and the Second Circuit.[72] The district court judge also concluded that "whatever the force of the presumption [in favor of disclosure], I am . . . convinced that the circumstances of the present case are indeed sufficiently extraordinary to require denial of the broadcasters' application."[73]

In reversing the trial court's denial, the *Criden* court analogized the interests identified in *Warner Communications* to the interests identified in *Richmond Newspapers*,[74] while it also made it clear that it

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67. *Id.* at 952. The court stated that only "the most extraordinary circumstances [could] justify restrictions on the opportunity" for the media to play the tapes for those who could not be in the courtroom to hear them. *Id.* The court also recognized that there was no dispute over protecting the physical integrity of the tapes, as all parties agreed that the system set up to copy the tapes was adequate for their protection. Recall the concern for the physical integrity of the tapes expressed by Judge MacKinnon in his dissent in *Mitchell, supra* note 30.

68. *Myers*, 635 F.2d at 951-52. *See infra* notes 45-48 and accompanying text.

69. The *Myers* case was decided in 1980, shortly after the decision in *Richmond Newspapers*, but prior to the Supreme Court decisions in *Globe Newspaper Co.* (1982), and *Press-Enterprise (I and II)* (1984 and 1986).

70. 648 F.2d 814 (3d Cir. 1981).

71. *Id.* at 814-15. *See supra* note 5.

72. *Id.* at 816 (quoting Judge Fullam's opinion in United States v. Criden, 501 F. Supp. 854, 859 (E.D. Pa. 1980)).

73. *Id.*

74. *Id.* at 820. ("[T]he interests identified by the Court in *Warner Communications*

was not ruling on a pure first amendment issue.[75] The court asserted that the involvement of high government officials and the issue of the integrity of law enforcement heightened the public's interest in the tapes.[76] Once again, the court weighed heavily the fact that the tapes already had been played in open court.[77] The court concluded that these factors clearly outweighed the risks to the defendants' right to a fair trial because those risks were based solely on conjecture, and because it would not be too difficult to impanel an impartial jury given the defendants' opportunity for voir dire examination.[78] As a further protection, the defendants could show on appeal that the jury had been influenced unfairly.[79]

The *Criden* court also looked to other Supreme Court cases for suggestions on how to avoid unfairly prejudicial pre-trial publicity.[80] Lastly, the court suggested that the similarity between live broadcast of a trial and rebroadcast of tape evidence might lead to similar effects on the administration of a trial, hinting that such cases should be treated the same way.[81]

Judge Weis wrote separately in *Criden*, disagreeing with the strong presumption given to the common law right by the majority.[82] He suggested that the Supreme Court in *Warner Communications* had "pointedly declined to accept the D.C. Circuit's standard" in the *Mitchell* case, and that courts should not give the presumption in favor of public access a quasi-constitutional stature by reinforcing it with the

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as supporting the right to access, 'the citizen's desire to keep a watchful eye on the workings of public agencies' and publication of 'information concerning the operations of government,' are identical to the interests identified in . . . *Richmond Newspapers* . . . .") (quoting *Warner Communications*, 435 U.S. at 598).

75. *Id.* at 820.

76. *Id.* at 821-22.

77. *Id.* at 822-26. *See supra* note 27.

78. *Id.* at 826-28. *See supra* notes 28, 57.

79. *Id.*

80. *Id.* at 827-28. The court cited Chandler v. Florida, 449 U.S. 560 (1981), and Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). See *supra* note 57 for a listing of the curative measures available for unfairly prejudicial pre-trial publicity.

81. *Criden*, 648 F.2d at 828-29. The effects created would be due to the incremental increase in publicity over that which would occur anyway through general reporting on the trial. *See supra* note 27.

The Supreme Court has held that live broadcast of a trial is not an inherent violation of the defendant's rights. Chandler v. Florida, 449 U.S. 560, 575 (1981). *See supra* note 57 and accompanying text.

82. *Criden*, 648 F.2d at 830-33 (Weis, J., concurring in part and dissenting in part). Judge Weis believed that the court should remand the case for further consideration. He said that any unfairly prejudicial material should be edited from the tapes. He also believed that the majority had misapplied the holding in *Richmond Newspapers*.

constitutional right to attend trials.[83] Judge Weis also stated that the common law right to copy should only be "one factor to be considered" in deciding a media request.[84] Judge Weis' opinion was the first attempt to recognize *Warner Communications* as the sole source of direction for appellate courts on the issue of media requests to copy evidentiary recordings.[85]

Judge Weis' analysis helps clarify the basic dispute which exists throughout all of the right to copy cases. The determinative question in these cases is who has the benefit of presumption. If the presumption is that the media request be granted, then the defendants have the burden of proving an infringement on their sixth amendment rights. On the other hand, if the presumption is in favor of protecting the sixth amendment right at the expense of the media's right to copy, then the media has the burden of disproving a sixth amendment infringement. Because the factors to be proved are so speculative, the party with the burden of proof has a difficult task. Thus, determining which party has the burden of proof, by determining which side has the benefit of the presumption, predicts the outcome of each media request case.

The troubling effect of the Supreme Court's lack of guidance on this issue is apparent under this presumption analysis. When a constitutional right (the defendant's sixth amendment right to a fair trial) conflicts with a common law right which is just a "factor to be considered," the balance undoubtedly favors the party with the constitutional right. A presumption always exists in favor of protecting a constitutional right over a conflicting common law right, when the constitutional right is endangered.[86] Therefore, a common law right

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83. *Id.* at 831.

84. *Id.* Judge Weis claimed the other factors to be the defendant's fair trial right and the trial judge's concern for unfairly prejudicial publicity. The judge also referred to the privacy rights of those on the tapes and the fact that the tapes concerned public officials. *Id.* at 832-33. Judge Weis based these factors and the weight given to each on impressions of the constitutional nature of the defendant's right to a fair trial versus the public's right of accuracy in information and the desire for a gain in understanding. *Id.* at 831-33.

85. Judge Weis' opinion has gained some favor recently. *See* Valley Broadcasting Co. v. District Court, 798 F.2d 1289, 1296 n.9 (9th Cir. 1986); United States v. Beckham, 789 F.2d 401, 413 (6th Cir. 1986); *infra* notes 110-23, 127-35 and accompanying text.

86. *See* Note, *supra* note 43, at 126-28. What makes the presumption analysis more confusing is the fact that some courts of appeals have stated that they recognize a presumption of granting media requests, when they are in fact severely limiting the scope of that presumption because of their stronger presumption in favor of protecting defendant's fair trial rights. Thus, in reality there is no presumption in favor of granting requests, although initially it is stated as such. *See* United States v. Beckham, 789 F.2d 401 (6th Cir. 1986), *infra* notes 110-23 and accompanying text; United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982), *infra* notes 101-09 and accompanying text.

to copy, without constitutional underpinnings such as those offered by the *Myers* and *Criden* courts, seems to have no presumption in its favor.

The presumption to grant media requests, however, is not necessarily doomed if the defendant's constitutional right is not considered endangered. The presumption in favor of common law over a constitutional right is permissible if the danger to the constitutional right is based on a small risk, weak hypothesis, or conjecture. Some courts have used exactly this approach in determining the scope of the media's right to copy evidentiary recordings.[87]

C. *United States v. Jenrette*

The District of Columbia Circuit Court of Appeals in *In re NBC (United States v. Jenrette)*[88] was the third appellate court to consider media requests to copy Abscam tape evidence. The *Jenrette* court also reversed a district court denial of a request, relying on *Myers* and *Mitchell*. The court stated that the tapes should be considered "public property" because they had been played in open court,[89] and that the public has a substantial interest in the judicial process and in charges against public officials.[90] These factors strengthened the presumption in favor of granting access to copy and were enough to overcome the right of the defendant to a fair trial in light of the "therapeutic" measures available to insure an impartial jury.[91]

The court in *Jenrette*, unlike the courts in *Myers* and *Criden*, did not cite *Richmond Newspapers* to support the common law right to copy.[92] The *Jenrette* court did, however, provide a strong presumption to the right to copy even though the court did not find specific constitutional support for it.[93] The court stated that constitutional support was not necessary for the common law right to overcome the defendant's right to a fair trial. The *Jenrette* decision, therefore, is an

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87. *See, e.g.*, Valley Broadcasting Co. v. District Court, 798 F.2d 1289, 1293-94 (9th Cir. 1986), *infra* notes 127-35 and accompanying text; United States v. Jenrette, 653 F.2d 609, 613 (D.C. Cir. 1981), *infra* notes 88-93 and accompanying text.

88. 653 F.2d 609 (D.C. Cir. 1981). *See supra* note 5.

89. *Id.* at 614 (citing *Mitchell*, 551 F.2d at 1261, which had relied on Craig v. Harney, 331 U.S. 367, 374 (1947)).

90. *Id.*

91. *Id.* at 616-18. The court also referred to Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). For further suggestions on insuring an impartial jury, see *supra* notes 56-57.

92. *Jenrette*, 653 F.2d at 614 ("[T]he public's First Amendment right of access to the trial itself was fully respected in this case . . . ." *Id.* (footnote omitted)). This is the only reference in *Jenrette* to *Richmond Newspapers*.

93. *Id.* at 614-18.

example of a court finding a common law right strong enough to overcome a constitutional right because the court did not perceive the risk to the constitutional right to be great.

D. *Belo Broadcasting Corp. v. Clark*

The first federal court of appeals to deny media access to evidentiary recordings was the Fifth Circuit in *Belo Broadcasting Corp. v. Clark*.[94] The Fifth Circuit Court of Appeals took the opposite view from that of the Second Circuit Court of Appeals in *Myers*, holding that it was not the duty of the appellate court to forecast the future difficulty of a fair trial, and allowing the trial judge wide discretion.[95] Relying wholly on *Warner Communications*, the *Belo Broadcasting* court, while acknowledging the ambiguity of the Supreme Court's language concerning the scope of trial judge discretion, followed Justice Stevens' dissent in holding that "[o]nly an egregious abuse of discretion should merit [lower court] reversal."[96] Thus, according to *Belo Broadcasting*, an appellate court generally should defer to the lower court judge's determinations, and review only for a blatant abuse of discretion.

In its review of the lower court decision, the *Belo Broadcasting* court sustained the trial judge's view that the defendant's constitutional right to a fair trial overcame the media's rights, which the court described as "less compelling," "non-constitutional," and unrelated to any first amendment concerns.[97] In light of this reasoning, it is easy to see why the court concluded by stating: "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury."[98] The presumption in favor of access to copy, which had been considered strong in comparison to the speculative risk to a defendant's fair trial in *Myers*, *Criden*, and *Jen-*

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94. 654 F.2d 423 (5th Cir. Unit A Aug. 1981). In *Belo Broadcasting*, the media wanted to copy tapes of conversations in which the defendants (among them the Speaker of the Texas House of Representatives) made illegal deals with FBI agents posing as businessmen in a sting operation coined "Brilab." *See* Note, *Belo Broadcasting Corp. v. Clark: No Access to Taped Evidence*, 32 AM. U.L. REV. 257 (1982).

95. *Belo Broadcasting*, 654 F.2d at 430-33.

96. *Id.* at 431 (citing *Warner Communications*, 435 U.S. at 614 (Stevens, J., dissenting)). Justice Stevens believed that the trial judge was best able to perceive the circumstances of the case and, therefore, possible misadministration of justice. *Warner Communications*, 435 U.S. at 615 (Stevens, J., dissenting). *See supra* note 36. *See also Belo Broadcasting*, 654 F.2d at 431 n.18.

97. *Belo Broadcasting*, 654 F.2d at 432. The court refused to balance a free press right and a fair trial right, saying that the issue "is not before us." *Id.*

98. *Id.* at 431.

rette,[99] was considered in *Belo Broadcasting* to be no presumption at all in light of the trial judge's determination that some risk to the defendant's fair trial existed.[100]

E. *United States v. Edwards*

In 1982, the Seventh Circuit Court of Appeals attempted to reconcile the extreme positions taken in the Abscam cases and *Belo Broadcasting* when it reviewed a media request to copy evidentiary recordings in a case arising out of an investigation into the corrupt practices of an Indiana state senator.[101] In *In re Video-Indiana, Inc. (United States v. Edwards)*,[102] the court borrowed language from both the Abscam cases and *Belo Broadcasting*. The *Edwards* court stated that there was a presumption in favor of granting access, and cited *Mitchell* for the proposition that the "common law right supports and furthers many of the same interests which underlie those freedoms protected by the Constitution."[103] The court in *Edwards*, citing *Belo Broadcasting*, also admitted that "a number of factors may militate against public access."[104] The *Edwards* court's conclusion permits denial of access "only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture."[105] A trial court must clearly state its reasons for denying access so that the appellate court can decide if "relevant factors were considered and given appropriate weight."[106] The court's conclusion, while going beyond *Belo Broadcasting* by requiring a clear articulation of factors for appellate review, does not go as far as the Abscam cases in its presumption that access should be granted. The court does not reach the level of presumption of access given in the Abscam cases because the court is satisfied that when any number of factors have been articulated clearly, the presumption is outweighed.

Having established these governing principles, the *Edwards* court reviewed the trial record to determine if the judge had articulated suf-

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99. *See supra* text accompanying notes 61-93.

100. *See supra* text accompanying note 97.

101. *In re* Video-Indiana, Inc., 672 F.2d 1289 (7th Cir. 1982) (United States v. Edwards). The evidence in question was tape recordings of phone conversations between Senator Edwards and a private businessman discussing the exchange of money for legislative influence. *Id.* at 1290-91.

102. 672 F.2d 1289 (7th Cir. 1982).

103. *Id.* at 1294 (relying on *Mitchell*, 551 F.2d at 1258). This argument is similar to those articulated in the Abscam cases. For a review of these interests, see *supra* note 21.

104. *Edwards*, 672 F.2d at 1294 (quoting *Belo Broadcasting*, 654 F.2d at 434).

105. *Id.*

106. *Id.*

ficient reasons to warrant denial of access. In deciding that a denial was warranted, the court did not engage in any independent consideration of competing factors, but rather deferred to the trial judge's determinations.[107] The *Edwards* court refused to apply a broad rule concerning media requests to copy, insisting that all future requests would be considered on a case-by-case basis.[108]

In giving the presumption in favor of access some constitutional support, but at the same time allowing almost any of the trial judge's articulated factors to warrant a denial of access,[109] the *Edwards* decision resembled the *Belo Broadcasting* case more than the Abscam cases. The *Edwards* court effectively gave itself only a minimal avenue for reversing a lower court decision to deny access and, at the same time, adopted a confusing and unenforceable standard to guide lower court judges in making their decisions.

The differing standards which resulted from the Abscam cases and *Belo Broadcasting* are related directly to the lack of clear Supreme Court guidance on the issue. The reasonable conclusions in those cases are supported by sensible readings of *Warner Communications* and other cases dealing with trial openness. The *Edwards* case, while attempting to strike a middle ground between the Abscam cases and *Belo Broadcasting*, is really an example of the difficulties that can result when an appellate court attempts to borrow language from cases at both ends of the spectrum. The *Edwards* case foreshadows the difficulties encountered by the courts in the more recent cases, discussed in the next section, which also attempt to strike a balance between the two extremes.

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107. *Id.* at 1295. The *Edwards* decision seems internally inconsistent. While demanding articulated facts in order to review the trial judge's decision, the appellate court did not, in fact, decide whether the trial judge's reasons were sufficient to deny access. Instead, the appellate court deferred to the trial judge's discretion. The court did this because it believed that the weight given to each of the factors depends on the trial's factual setting, in which the trial judge is deemed best able to determine the interests of the parties. The appellate court, therefore, would not enforce any of the suggestions it had stated regarding the strength of the media's right. *Id.*

108. *Id.* at 1296.

109. The court used language which suggested that certain arguments alone would be insufficient to convince the appellate court to affirm the trial judge's determination. For example, the court rejected reliance on a Judicial Conference resolution prohibiting the broadcasting of trials. *Id.* at 1295. The court also cast doubt on arguments that the jury in the ongoing trial would be unfairly influenced, and that grave harm could result at a future trial. *Id.* at 1295-96. Despite this language, the court's final decision deferred to the trial judge's speculation on the latter two factors, in effect giving no substance to its own suggestions.

III. THE RECENT CASES: ATTEMPTED MODERATION

A. *United States v. Beckham*

The Sixth Circuit Court of Appeals recently upheld a district court judge's denial of a media request to copy evidentiary recordings in *United States v. Beckham*.[110] In a lengthy opinion, Judge Jones first addressed the constitutional grounds on which the media claimed a right to copy. Refusing to apply the constitutional principles of *Richmond Newspapers*, Judge Jones held that the media's opportunity to be in the courtroom and report on what they had observed satisfied all constitutional claims.[111] Relying on the Supreme Court's opinion in *Warner Communications*, the *Beckham* majority emphasized that the constitutional principles which give the media access to the courtroom did not give the media a special right of access to copy what they heard.[112]

The *Beckham* court considered the common law arguments separately from the constitutional ones. Instead of using the constitutional arguments and their underlying values as support for the common law right, the court said that the defendant's constitutional right to a fair trial outweighed any public benefit to be received by granting access under the common law right to inspect and copy.[113] The court found that the trial judge articulated and weighed the appropriate factors. Reminiscent of *Edwards*, the *Beckham* court afforded the trial judge substantial discretion, only requiring a reasoned summary of the arguments for denying access.[114] Once again, the court's conclusion at-

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110. 789 F.2d 401 (6th Cir. 1986). The evidence requested was audio tape recordings of persons accused of defrauding the City of Detroit. A city official was included among the defendants. Before the appeal on the denial of access took place, the trial ended and the media then received access to copy the tapes. The Sixth Circuit Court of Appeals declared, however, that the appeal was not moot because the legal issues presented were capable of repetition and evading review. *Id.* at 403-05.

111. *Id.* at 406-09, 413-15. The court stated that the "open trial" cases did not apply because their purpose was to protect against the total restriction of information, whereas here, the media's access to information was not restricted totally, since they were able to attend the trial (in fact, the press was given preferential seating) and observe the presentation of the tapes in open court. Therefore, any "fundamental right to know" had not been abridged; only an unrelated right to copy was involved. *Id.* at 414-15. *See supra* notes 40, 54. The court disagreed with, and distinguished the arguments offered by the courts in the Abscam cases for the same reasons. *Id.* at 413-14.

The media also requested documentary evidence which did not include evidentiary recordings. The appellate court granted this request. *Id.* at 412.

112. *Id.* at 408-09. Recall the Supreme Court's handling of this issue in *Warner Communications* where it interpreted Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *See supra* text accompanying notes 39-41. *See also supra* note 54.

113. *Beckham*, 789 F.2d at 409-10.

114. *See supra* text accompanying notes 105-06.

tempts to strike a middle ground between the "compelling" arguments necessary to deny access in *Myers* and the wide discretion allowed in *Belo Broadcasting*.[115]

The court's ensuing examination of the trial judge's reasoning, however, made it clear that the trial judge possessed a wide degree of discretion which, in effect, negated the court of appeals' power of review. The *Beckham* court deferred to the trial judge's opinion on all relevant factors.[116] The court reasoned that because the trial judge was able to make first hand observations, and had primary responsibility for providing a fair trial, the decision to deny media access to copy was not an abuse of discretion even though it may have been "overly cautious."[117] Thus, while the Sixth Circuit Court of Appeals requires an articulation of the factors, its review of the trial judge's decision is very deferential. Like *Edwards*, the *Beckham* court ended up with a standard quite similar to that used in *Belo Broadcasting*, leaving the trial judge to determine the strength of the common law right of access to copy evidentiary recordings.

The *Beckham* decision presents the two questions confronting appellate courts when they review a lower court decision on a media request to copy. The first question concerns the strength of the common law right. Its strength ranges from a strong presumption supported by Supreme Court decisions protecting the rights of the public to courtroom information, as seen in the Abscam cases,[118] to a presumption which is merely one factor to be considered in light of the defendant's right to a fair trial, and, therefore, no presumption at

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115. See *supra* notes 61-69 and accompanying text for discussion of *Myers* and notes 94-100 and accompanying text for discussion of *Belo Broadcasting*.

The *Beckham* court agreed with the reasoning of the *Criden* court that trial judges need to articulate reasons for denying a request, and that when public officials are recorded on the tapes the public's interest in the tapes is heightened. However, the *Beckham* court ruled consistently with the result reached by the dissent in *Criden* by holding that the majority in *Criden* misapplied *Richmond Newspapers*. *Beckham*, 789 F.2d at 412-13. *See supra* notes 82-85.

The *Beckham* court disagreed with the *Jenrette* and *Mitchell* courts, stating that those courts were looking only at the importance of the availability of information when they reached their conclusions. *Beckham*, 789 F.2d at 414.

116. *Beckham*, 789 F.2d at 415. Among the district court's findings were "that the curative powers of sequestration, voir dire and cautionary instructions would be insufficient," and that reliance on those curative measures would result in unfairly limiting the size and diversity of a jury pool. The district court also found "that the increase in publicity from the [tapes] . . . would affect the already hostile community atmosphere to a degree that would pervade the entire community." *Id.* The court deferred to these and several other trial judge determinations.

117. *Id.*

118. *See supra* notes 61-74 and accompanying text.

all.[119] The second question concerns which court will determine the relevant factors and their weight. The answer ranges from the *Myers* court's active appellate review,[120] to the almost unbridled lower court discretion advocated by Justice Stevens in *Warner Communications*,[121] and the Fifth Circuit Court of Appeals in *Belo Broadcasting*.[122] In *Beckham*, although the court sought to hear the trial judge's reasons for denying access, review of the reasons was as superficial as that undertaken in *Belo Broadcasting*. In this way, the *Beckham* court never reached the first issue of how strong the media's right should be, because the court only made unenforced suggestions as to the strength of the presumption in favor of granting access.[123]

B. *United States v. Webbe*

The Eighth Circuit Court of Appeals in *United States v. Webbe*[124] defined the scope of trial judge discretion in determining the media's right to evidentiary recordings. In *Webbe*, the court followed *Belo Broadcasting* on the issue of discretion and deferred to the district court's judgment on the factors that it considered.[125] In a short opinion, the *Webbe* court simply reviewed the list of factors considered by the district court judge, and determined that the court's response to those factors was reasonable, and thus affirmed the decision denying the media's request.[126]

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119. As seen in *Belo Broadcasting*, *supra* notes 97-100 and accompanying text.

120. *See supra* note 66 and accompanying text.

121. *Warner Communications*, 435 U.S. 589, 615 (1978). *See supra* note 36 and text accompanying *supra* note 95.

122. *See supra* notes 95-96 and accompanying text.

123. The lengthy dissent in *Beckham*, written by Judge Contie, argued for a strong presumption in favor of granting access. Judge Contie was concerned with the first unresolved aspect, the strength of the right to copy. Even Judge Contie did not, however, address the level of scrutiny applied to trial judge discretion. Courts must address both unresolved issues in order to clarify the current state of the media's right. *Beckham*, 789 F.2d at 415, 425 (Contie, J., dissenting).

Judge Contie went so far as to say that Supreme Court decisions concerning "open trials" apply directly to the flow of information to the public in the form of recorded evidence of public officials and, therefore, the Constitution requires the granting of media requests to copy. *Id.*

124. 791 F.2d 103 (8th Cir. 1986). In *Webbe*, the media sought audio tapes admitted as evidence in a trial charging a city official with voting fraud and obstruction of justice. At the time of the appeal, the defendant already had pleaded guilty and the media had received written transcripts of the tapes. CBS (arguing for the media) claimed on appeal that the lower court erred in denying its request to copy the tapes, arguing for a strong presumption like that in *Myers*. *Id.* at 104-05.

125. *Id.* at 106.

126. *Id.* at 106-07. The court simply restated the trial judge's determinations, giving great weight to the fact that the media were allowed to attend the trial and to receive

In *Webbe*, the Eighth Circuit Court of Appeals appears not to have given the common law right to copy any presumption. Had the trial judge determined, however, that the common law right was stronger than the defendant's constitutional claims and granted the request, the court in *Webbe* might also have deferred to the lower court's judgment. While the *Webbe* opinion makes clear the court's substantial deference to the trial court, it is less clear in resolving the strength of the common law right. By so doing, the *Webbe* court does not answer the primary question of what the media's right should be, except to hold that the trial judge can determine its extent in each case.

C. *Valley Broadcasting Co. v. District Court*

The Ninth Circuit Court of Appeals addressed the media's right to copy evidentiary recordings in *Valley Broadcasting Co. v. District Court*.[127] In that case, the court reversed a district court decision denying access to audio and video tapes.[128] The opinion in *Valley Broadcasting* addressed all aspects of the media's right to copy. The *Valley Broadcasting* court discounted the media's direct constitutional arguments,[129] choosing instead a "middle ground stance," like the one preferred in *Edwards*.[130] The court concluded, however, that the reasons asserted by the district court were inadequate to overcome a strong presumption in favor of access.[131]

In reversing the district court's request denial, the *Valley Broadcasting* court reasoned that the district court's concern for the physical integrity of the tapes was unfounded because a reasonably safe system had been established for copying.[132] The court also dismissed the

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transcripts of the tapes. The court also afforded deference to the judge's determinations that the current and future trials of Webbe would be adversely affected by a release of the tapes, and that a future trial was " 'more than merely hypothetical.' " *Id.* at 107 (quoting United States v. Edwards, 672 F.2d 1289, 1296 (7th Cir. 1982)).

127. 798 F.2d 1289 (9th Cir. 1986). In *Valley Broadcasting*, the media requested immediate release of both audio and video tape evidence which was admitted into evidence in United States v. Spilotro, No. 83-115 (D. Nev. Sept. 4, 1986), a prominent RICO conspiracy case in Nevada. *Id.* at 1290.

128. *Valley Broadcasting Co.*, 798 F.2d at 1294, 1297. The court ruled on a petition for a writ of mandamus. Using the mandamus procedure, the media brought the issue to the appellate level immediately. On a writ of mandamus petition, the appellate court had to find the district court's decision "clearly erroneous as a matter of law" in order to reverse, which the court did. *Id.* at 1291-92.

129. *Id.* at 1292-93.

130. *Id.* at 1293.

131. *Id.* at 1294.

132. *Id.* at 1295.

lower court's concern for preventing unfairly prejudicial publicity which would affect the jury in a future trial because that concern is based on conjecture and speculation. The same reasons prompted the court of appeals to reject the argument that the jury in the ongoing case would be tainted.[133]

Thus, the court in *Valley Broadcasting* created a strong presumption in favor of granting media requests to copy without using constitutional supports. The non-constitutional presumption was strong enough to overcome the argument that the defendants' constitutional right to a fair trial was endangered. The court based this conclusion on its perception that unfair prejudice was conjectural and speculative. Therefore, in light of the common law presumption in favor of granting access, the media received the tapes.

Another important dimension in *Valley Broadcasting* was the court's refusal to follow the trial judge's determination that the potential unfair prejudice to the defendants should prohibit release of the tapes.[134] Using language from *Edwards* as support, the *Valley Broadcasting* court insisted that the trial judge be given substantial discretion in determining whether to grant or deny a media request.[135] However, under the *Valley Broadcasting* holding, the exercise of trial judge discretion is not unreviewable. This is a significant departure from *Edwards*, which deferred greatly to the trial judge's determination on the issue of possible prejudicial publicity.

The Ninth Circuit Court of Appeals has given some bite to its standard of review. The court required that the trial judge articulate not just the existence of a potential for unfair prejudice, but also the factual basis for the danger.[136] The Ninth Circuit Court of Appeals, therefore, created a stricter standard of review than the *Edwards* and *Beckham* courts for lower court determinations that the defendant may be unfairly prejudiced by publicity arising from the media's pres-

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133. *Id.* at 1294-97.

134. *Id.* at 1296 n.13.

135. *Id.* at 1295.

136. *Id.* The court stated:

> The only potential prejudice appropriate for consideration by the district court was, therefore, the added prejudice that might result from broadcasting excerpts of the tapes as opposed to simply describing their contents. While we recognize that the added danger of jury taint arising from the transmission of the tapes themselves may vary from case to case, we reemphasize that the district court must articulate the factual basis for the danger without relying on hypothesis or conjecture.

Id.

entation of evidentiary recordings.[137] The Ninth Circuit Court of Appeals assigned the right to copy a strong presumption while still discounting any constitutional supports for the common law right to copy. It is thus the true middle ground approach between the Abscam cases and *Belo Broadcasting*.

These recent cases put into proper perspective the current status of the media's right to copy evidentiary recordings. In their efforts to guarantee justice, the Sixth, Eighth, and Ninth Circuit Courts of Appeals borrow language from conflicting lines of early cases which seek either to recognize or deny constitutional support to the common law right to copy.[138] The recent cases all agree that the common law right to copy is not absolute, and that certain factors will militate against release of evidentiary recordings. The cases also require justification from a trial judge for denying a media request to copy. None of the courts, however, are willing to accept the *Myers* court's quasi-constitutional stance.

The *Webbe* opinion embraces *Belo Broadcasting* wholeheartedly on the issue of trial judge discretion, while the *Beckham* majority opinion, attempting to strike a middle ground, resembles *Belo Broadcasting* because of its deference to lower court determinations. The only recent decision which truly achieves a middle ground between the two extremes of the Abscam cases and *Belo Broadcasting* is *Valley Broadcasting*. That case borrows language from both ends of the spectrum in determining the strength of the media's right, and also requires both a clear articulation of a lower court's reasoning and a standard of review which enables the appellate court to examine carefully the relevant factors considered below. The Court of Appeals for the Ninth Circuit effectively controls the definition of the scope of the

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137. The Ninth Circuit Court of Appeals has had experience with the issue of pre-trial publicity. In CBS v. District Court, 10 Media L. Rep. (BNA) 1529 (9th Cir. 1984) (United States v. DeLorean), the court held that the threat of unfair pre-trial publicity did not justify a prior restraint on the media from broadcasting tapes already in their possession. *Id.* at 1535. The *DeLorean* case is distinguishable from *Valley Broadcasting* because the media already possessed the tapes which they wished to play for the public. The decision is important, however, because the Ninth Circuit Court of Appeals summarized its conclusions about the speculative and conjectural nature of pre-trial publicity in the form of broadcasted tape evidence. *Id.*

138. *See Beckham*, *supra* notes 110-23 and accompanying text; *Webbe*, *supra* notes 124-26 and accompanying text; *Valley Broadcasting*, *supra* notes 127-37 and accompanying text.

See also the Abscam cases, *supra* notes 61-93 and accompanying text; *Belo Broadcasting*, *supra* notes 94-100 and accompanying text; *Edwards*, *supra* notes 101-09 and accompanying text.

media's right to copy evidentiary recordings.[139]

IV. SUMMARY AND CONCLUSION

The status of the media's right to copy evidentiary recordings is dependent upon the appellate courts' answers to two equally important questions. The first question asks what is the strength of the media's common law right to access; the second question asks which court, the trial court or the appellate court, will determine the relevant factors and their weight. Depending on the jurisdiction, the strength of the media's right ranges from quasi-constitutional to just one factor to be weighed in light of the defendant's fair trial right.[140] Also varying among the courts of appeals is the degree of deference afforded to lower court determinations regarding the relevant factors and their weight when deciding whether to grant a media request to copy evidentiary recordings.[141]

The opinions discussed in Parts II and III of this comment illustrate that the status of the media's right to copy varies among the jurisdictions. Arguments for or against strengthening the media's right are not hard to make. One reasonably can elevate the right by analogizing it to the public's right to open trials.[142] It is just as reasonable to make the argument that those two rights are unrelated and that the common law right is greatly outweighed by the defendant's right to a fair trial.[143]

An objective assessment of the real issue in a right to copy case compels a standard between the two extremes offered by the early cases. The underlying issue is the long-standing debate over the proper balance between the public's right to information and the defendants' rights to fair trials. The key word is balance. There must be a balance between the media's argument that the public has a right to hear evidentiary recordings, and the defendants' argument that their constitutional rights deserve strict protection.[144]

It is important that there be a presumption in favor of granting

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139. *See supra* notes 127-37.

140: *See supra* notes 118-19 and accompanying text.

141. *See supra* notes 120-22 and accompanying text.

142. *See Myers*, *supra* notes 61-69 and accompanying text; *Criden*, *supra* notes 70-87 and accompanying text; Note, *supra* note 43, at 126-28.

143. *See, e.g.*, *Belo Broadcasting*, *supra* notes 97-98 and accompanying text; *Criden*, (Weis, J., concurring in part and dissenting in part), *supra* notes 82-85 and accompanying text; Note, *supra* note 16, at 556.

144. An argument can be made that the solution to this balancing dilemma should be left to legislatures that should recognize a right of access while providing appropriate constraints. *See* Note, *supra* note 4.

media access to evidentiary recordings. This means that courts should assume a posture which would grant all media requests to copy, given that the tapes' proper care is assured and that the media's purpose is, indeed, the dissemination to the public of accurate trial information.[145] This presumption is necessary because the purpose of copying and disseminating evidentiary recordings is to insure that the public knows what transpires within its government and its institutions. The interest is intensified when a government official is the subject of the recording.

The presumption in favor of granting media requests, however, in no way can be considered absolute, and need not be afforded a quasi-constitutional status. A trial judge should be able to deny a request upon sufficient reason. The only justifiable reason for denying a request is protection of a defendant's constitutional fair trial right. If that right truly is in jeopardy, the defendant's constitutional right outweighs the media's common law right. Because the disclosure leads to only an incremental increase in publicity, and the courts have numerous remedies for unfairly prejudicial publicity, these exceptions will be rare.

An abuse of discretion arises when a trial judge denies access because he or she perceives the defendant's fair trial right to be in jeopardy, even though the defendant's right is not truly threatened.[146] Because of this, an appellate court should require clearly articulated reasons for the denial. Thus, a media request would be denied only when an appellate court agreed with the trial judge's denial. The presumption in favor of granting access would remain a presumption, but subject to rare exceptions under particular circumstances brought to the appellate court's attention.[147] This is the approach taken in *Valley*

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145. For example, the request could be denied where it could be shown that the media's purpose was strictly commercial, exploitive, or in some other way motivated by personal animosity toward the accused. The interest to be protected here is the privacy interest of those on the tapes. When the media is not claiming an interest related to the public's right to know, the scales easily tip in favor of protecting the interests of those parties on the tapes who seek to deny access.

146. An example of this would be the situation in *Valley Broadcasting* where there were insufficient facts to support the trial judge's conclusions that the defendant's fair trial right was in jeopardy.

147. An exception occurs when a trial judge can tell the appellate court about specific happenings surrounding the trial or the tapes which would be affected by the tapes' release. These circumstances could include such things as a history of violence concerning some aspect of the trial (a matter involving community race conflicts, for instance), or material on the tapes which will elicit an extreme emotional reaction by those who observe it (recordings of an actual rape or murder, for instance). In these instances, potential jurors may be so affected that it may be impossible to impanel a future impartial jury.

Broadcasting. There, the trial judge could not make the necessary articulation of the danger to the defendant's fair trial right, and the appellate court, therefore, did not allow an exception.

In the absence of clear Supreme Court guidance, the *Valley Broadcasting* standard is a workable one. The Ninth Circuit Court of Appeals in *Valley Broadcasting* has properly synthesized the Supreme Court's guidance on the issues, giving the two interests at stake correct weight by recognizing a strong presumption in favor of granting media requests, but allowing an avenue for the defendant's constitutional fair trial right to override it. The question of the strength of the media's right probably will not be answered definitively until the Supreme Court decides a case identifying a standard which evaluates the right to copy evidentiary recordings.[148]

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148. There are, however, inherent difficulties in getting such a case before the Court. For example, it is not clear who will bring the appeal. By the time the Court renders a decision, the value of getting the tapes in any one case would be greatly diminished. This fact decreases the incentive for the media to devote resources to pursuing a Supreme Court appeal once they have lost at the appellate level. A defendant who loses below will not bring an appeal if the tapes already have been released, because any damage to the defendant's trial already has occurred.